MARIAM SASIMAN

v.

BBMB FACTORING BHD

HIGH COURT MALAYA, SHAH ALAM
FAIZA TAMBY CHIK J
[BANKRUPTCY NO: 29-331-97]
5 OCTOBER 1998

BANKRUPTCY: *Creditor's petition - Appeal against reinstatement - Whether respondent should have filed a fresh creditor's petition with leave of court instead of reinstatement - Bankruptcy Rules 1969, r. 120 - Whether SAR had discretion to allow the reinstatement - Whether reinstatement required leave of court*

BANKRUPTCY: *Practice and procedure - Reinstatement of creditor's petition - Whether strict compliance of Bankruptcy Act and Rules was required - Whether appellant was entitled to demand such compliance - Whether there was a lacunae for r. 296 of Bankruptcy Rules 1969 to operate - Whether r. 120 was clear in its application*

WORDS AND PHRASES: *"neglect to appear" - Meaning of - Bankruptcy Rules 1969, r. 120*

The appellant appealed against the decision of the Senior Assistant Registrar ('SAR') who had overruled the appellant's preliminary objection and granted an order allowing the reinstatement of the creditor's petition ('CP') by the respondent. The CP was earlier dismissed by the SAR when the respondent failed to appear at the hearing.

The appellant made her preliminary objection on a point of law that the CP once dismissed and/or struck off for non-appearance of the petitioning creditor at the hearing could not be reinstated as the respondent must comply with r. 120 of the Bankruptcy Rules 1969 ('Rules').

Held:

[1] On a literal interpretation of r. 120 of the Rules, it is clear that if a petitioning creditor neglects to appear at the hearing of the petition, then the petition must be dismissed and no subsequent petition by the same creditor against the same debtor in respect of the same act of bankruptcy can be presented without leave of the court.

[2] The question of whether leave of the court was required by the respondent to file a fresh CP revolved around the interpretation of the key words, "neglects to appear" in r. 120 of the Rules. The word "neglects to appear" means "neglects to attend" and "neglects to attend" in *Stroud's Judicial Dictionary* is "absent" which does not connote that the person referred to was ever previously present. Its ordinary sense is to describe a person or persons as not being in a particular place at the time referred to. The respondent was absent at the time referred to and at the particular court fixed to hear the CP. The result was that the respondent had neglected to appear at the said hearing.

[3] As the CP was struck off due to the respondent's neglect to appear at the hearing, the SAR had no discretion to allow the reinstatement of the same, as the Bankruptcy Act 1967 ('the Act') and Rules had no provisions allowing for such a reinstatement.

[3a] A creditor's petition struck off for non-appearance, means that, it never existed on the court's records in the first place. Therefore, the CP struck off could not be reinstated as one could not reinstate something which did not exist in the first place. The respondent would have to file a fresh CP with the leave of the court as required by r. 120 of the Rules.

[4] If the reinstatement of a creditor's petition is allowed, the reinstatement itself will require leave of the court. There was no such application for leave made in this instance.

[5] The Act and Rules are strict and rigid rules of procedure designed to protect judgment debtors. Bankruptcy is a very serious matter of public interest. The stigma attached to a bankrupt will remain with the bankrupt, even long after the bankrupt has discharged himself. Furthermore, society's perception of a bankrupt is an act of dishonesty meaning that one is not able to pay his or her debt when the debts are due. In view thereof, the appellant is entitled to demand of the respondent, strict adherence of r. 120 of the Rules.

[6] For r. 296 of the Rules to operate, there must be a *lacunae* in either the Act or the Rules. There was no *lacunae* in this instance. Rule 120 of the Rules clearly deals with the consequences pertaining to the non-appearance of a petitioning creditor.

[6a] Order 32 r. 5(4) of the RHC which allows chambers applications dismissed for non-attendance of a party at the hearing, to be reinstated. However, it is different from a bankruptcy execution proceedings. Although chambers applications and creditors' petitions are both

applications in chambers, a creditor's petition is a mode of execution proceedings, a mode of enforcement after judgment and/or a full trial, whereas chambers applications are interlocutory applications before judgment and/or full trial, which reinstatement will not prejudice a full trial. Furthermore, the nature of a creditor's petition is a serious matter of public concern. As such, bankruptcy matters require very strict and rigid adherence to bankruptcy rules and regulations.

[7] It is this court's opinion that there is no room for other rules such as the Rules of the High Court 1980 to operate in the realm of bankruptcy. The Rules of the High Court 1980 will only operate if there is a *lacunae* in the Act or the Rules. In the instant case, there was no *lacunae*.

[Appeal allowed.]

Cases referred to:
Alfred Dunhill Ltd v. Sunaptic SA [1979] FSR 337 ***(refd)***
DP Vijandran v. Majlis Peguam [1995] 2 CLJ 815 ***(refd)***
Esa bin Sa'yon v. Woon Kim Poh & Anor [1996] 2 CLJ 885 ***(refd)***
Re Teok Kien Seng (t/a Kien Hoe Seng Engineering Construction Co); ex parte Saw Siew Ciew [1991] 3 CLJ 2599 ***(foll)***

Legislation referred to:
Bankruptcy Rules 1969, rr. 120, 296
Rules of the High Court 1980, O. 32 r. 5(4), O. 41, O. 56 r. 1
Legal Profession Act 1976, s. 34

Other source referred to:
Stroud's Judicial Dictionary, pp 9, 1669

For the judgment debtor - M/s Malik & Partner
For the judgment creditor - M/s Kumar Jaspal Quah & Aishah

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:

Brief Facts

The creditor's petition dated 29 May 1997 ('the CP') was dismissed by the Senior Assistant Registrar ('SAR') on 22 January 1998 because the judgment creditor/respondent ('respondent') failed to appear in the court fixed for hearing of the CP.

The respondent then applied by summons-in-chambers dated 19 February 1998 to the SAR for reinstatement of the CP [see encl. 13].

The judgment debtor/appellant ('appellant') made a preliminary objection on a point of law that a CP once dismissed and/or struck off for non-appearance of the petitioning creditor at the hearing of the same cannot be reinstated as the respondent must comply with r. 120 of the Bankruptcy Rules 1969 ('Rule 120').

The SAR overruled the preliminary objection and granted an order for reinstatement of the CP on 19 March 1998.

This is an appeal to a judge in chambers under O. 56 r. 1 of the Rules of the High Court 1980 against the decision of the SAR given on 19 March 1998, overruling the appellant's preliminary objection and granting an order allowing the reinstatement of the CP dated 29 May 1997.

Issues For Consideration

(1) Whether the respondent must comply with r. 120 whereby the respondent must file a fresh CP and obtain leave of the court?

(2) Whether the SAR has a discretion to allow reinstatement of a CP as the Bankruptcy Act 1967 ('the Act') and the Bankruptcy Rules 1969 ('the Rules') have no provisions allowing reinstatement of the same?

(3) Even if the reinstatement of the CP is allowed, whether the reinstatement itself requires leave of the court?

(4) Whether the appellant is entitled to demand strict compliance of the Act and the Rules on all matters pertaining to bankruptcy, as the Act and the Rules are rigid rules of procedure?

(5) Whether r. 296 of Bankruptcy Rules 1969 ('Rules 296') is relevant in the present case and as such whether the Rules of the High Court 1980 ('RHC') is applicable?

Respondent Must Comply With Rule 120

On a literal interpretation of r. 120, it is clear that, if the petitioning creditor neglects to appear at the hearing of the petition, then the petition must be dismissed and no subsequent petition by the same creditor against the same debtor in respect of the same act of bankruptcy can be presented without the leave of the court.

The CP was struck-off by the SAR on 22 January 1998 for non-appearance of the respondent and the respondent must file a fresh CP and obtain leave of the court to do so in strict compliance with r. 120.

The question whether leave of the court is required by the respondent to file a fresh CP revolves around the interpretation of these key words. "neglects to appear" in r. 120. The words, "neglects to appear" means "neglects to attend". "Neglects to attend" as defined at p. 1669 in *Stroud's Judicial Dictionary* see "absent'. And the word, "absent" at p. 9 of the *Stroud's Judicial Dictionary* is defined as follows

> "Absent" does not connote that the person referred to was ever previously present; its ordinary sense is, to describe a person or persons as not being in a particular place at the time referred to.

As such, as the respondent was absent at the time referred to and at the particular court fixed to hear the CP, the result was that the respondent had neglected to appear at the said hearing.

Furthermore, in the case of *DP Vijandran v. Majlis Peguam* [1995] 1 MLJ 391 at p. 392, Low Hop Bing JC as he then was, said that the word "neglect" in the context of s. 34 of the Legal Profession Act 1976 connotes a wrongful act arising out of a failure to exercise reasonable care in the performance of a duty as opposed to the exercise of a discretion. The date for hearing of the CP was fixed by the court on 22 January 1998, and the respondent's petition solicitors had failed in the performance of his duty to take reasonable care to note down the hearing date of the CP properly. Moreover, in the hearing of the petition, the respondent should be, in the best position to know whether the documents were in order or not, as stated by the respondent at para. 3 of the affidavit in support of the reinstatement of the CP dated 18 February 1998.

In the circumstances, the respondent had neglected to appear at the said hearing and that a CP once struck off due to the non-appearance of the petitioning creditor could not be reinstated but leave must be obtained from the court to file a fresh CP in strict compliance with r. 120.

No Discretion Of The SAR To Allow Reinstatement Of The CP

As the CP dated 29 May 1997 was struck off due to the respondent's neglect to appear at the hearing, the SAR has no discretion at all to allow the reinstatement of the same, as the Act and the Rules have no provisions allowing such reinstatement. The Act and the Rules are a comprehensive piece of legislation designed to deal with all matters pertaining to bankruptcy and there is no where mentioned in the Act and the Rules to permit reinstatement of a CP. It is to be noted that other rules have no place to play when it comes to matters pertaining to bankruptcy in that the Act and the Rules must be complied with strictly.

Therefore, when a CP is struck off for non-appearance, what it basically means, is that, it never exists in the court's records in the first place. Therefore, the CP cannot be reinstated at all as one cannot reinstate something which never exists in the first place. The respondent will have to file a fresh CP with the leave of court as required by r. 120.

In this case, even if the CP is set aside, there will be no prejudice to the respondent, as the respondent may still file the CP afresh but what they need to do is to obtain leave of the court as required by r. 120.

It must be borne in mind that bankruptcy is not the only mode of execution available under the law. There are other mode of executions available as well.

The petitioning solicitor, Cik Shelina Binti Razali ('the petitioning solicitor') stated at para. 3 of her affidavit-in-support of the reinstatement dated 18 February 1998 [see encl. 12], that she came to the court on the day fixed for hearing and saw a rubber stamp chopped opposite this case no. 29-331-97 on the courts list on the court's notice board with the words written, "document not in order ... hearing date 9 July 1998." That this is the hearing of the respondent's CP and the respondent is in the best position to know whether the documents are in order or not. Moreover, why was the appellant able to attend the hearing without any confusion as to the date fixed for hearing on 22 January 1998 and as to whether the documents were in order or not. Furthermore, the petitioning solicitor could have requested the court's counter clerk to make a copy of the said list with the said rubber stamp chopped on the same and attached the same as an exhibit evidence in her affidavit-in-support of their application for reinstatement. This, the petitioning solicitor did not do and it was not possible for the appellant to verify the contents of the said affidavit.

As stated by the respondent at paras. 4 and 5 of the said affidavit [see encl. 12] the names of the clerks at the court counter and outside the SAR's office where the petitioning solicitor spoke to were not even mentioned at all. In the circumstances, there is no way she can verify the contents of the said affidavit.

In the case of *Esa bin Sa'yon v. Woon Kim Poh & Anor* [1995] 3 AMR 2524 at p. 2525 the court said,

> The SAR's affidavit did not support VT's allegation; furthermore, VT's affidavit did not contain sufficient material for the trial judge to exercise his discretion to reinstate the present case.

In the instant case, the discretion has been exercised on insufficient material for the reasons stated above. In the *Esa bin Sa'yon* case, the court further stated,

> Be that as it may, the issue before me now is the question of reinstatement of the present case and for the purpose of this judgment I need only consider the contents of Vasumathi's affidavit that was affirmed on 30 July 1994 and nothing else. If it was true that my immediate predecessor had ordered Vasumathi to go out of the court room with the then senior assistant registrar to check the court file as alleged, why was the affidavit of the then senior assistant registrar not enclosed herein to support that allegation, after all the then senior assistant registrar is still in the government service ... Vasumathi's affidavit did not contain sufficient material for me to exercise my judicial discretion to reinstate the present case. I have said elsewhere that affidavits play a crucial role in interlocutory proceedings and in every application in chambers as submissions and decisions are invariably based on them. The basic rules of a affidavit practice are contained in O. 41 of the RHC. Special care should be paid while drafting affidavits. As Roskill LJ said in *Alfred Dunhill Ltd v. Sunaptic SA* [1979] FSR 337:
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> > Draftsmen of affidavits should not as a general rule, put into the mouths of the intended deponent legal arguments of which those deponent are unlike ever to have heard.

Even If Reinstatement Of CP Is Allowed, The Reinstatement Itself Will Require Leave Of The Court

In any event, even if the reinstatement of the CP is allowed, the reinstatement itself will require leave of the court. Of the nine (9) paragraphs of the affidavit in support dated 18 February 1998 of the petitioning solicitor, there is no single paragraph in the said affidavit asking for leave of the court for reinstatement of the CP [see encl. 12].

Bankruptcy Rules 1969 Are Strict And Rigid Rules Of Procedure

The Act and the Rules of Bankruptcy are designed to deal with all matters pertaining to bankruptcy. As such, they are strict and rigid rules of procedure designed to protect the category of persons called judgment debtors. Bankrupt must follow the strict and rigid rules laid down there without any deviation thereof. The respondent is under a strict duty to follow the strict and rigid rules of procedure laid down in the Act and the Rules. Failing such compliance means that the CP must be struck off. A second CP filed afresh with leave of the court must be in strict compliance with r. 120.

It must be made aware that to make a person a bankrupt is basically, to kill off a person's legal personality with all the impending legal restriction and

prohibitions. As such, bankruptcy is a very serious matter of public interest. The stigma attached to a bankrupt will remain with the bankrupt, even long after the bankrupt has discharged himself. Furthermore, the society's perception of a bankrupt is an act of dishonesty meaning that one is not able to pay his or her debt when the debts are due. In view thereof, the appellant is entitled to demand of the respondent strict adherence of r. 120.

Rule 296 Is Irrelevant In The Present Case And The RHC Is Not Applicable

It must be noted that for the RHC to apply, it must come within r. 296. It is clear that for r. 296 to operate, there must be a *lacunae* in either the Act or the rules. There is no *lacunac* here as r. 120 is clear in that it is deliberately included in the Bankruptcy Rules 1969 to deal with the situation of the consequences of non-appearance of a petitioning creditor.

Moreover, O. 32 r. 5(4) of the RHC allowing chambers application after been dismissed for non-attendance of a party at the hearing may be reinstated, is different from a bankruptcy execution proceedings. Although chambers applications and creditor's petition are both applications in chambers, a creditor's petition is a mode of execution proceedings, a mode of enforcement after judgment and/or full trial; whereas chambers applications are interlocutory applications before judgment and/or full trial, which said reinstatement will not prejudice a full trial. Furthermore, the nature of a creditor's petition is a serious matter of public concern. As such, bankruptcy matters requires very strict and rigid adherence to bankruptcy rules and regulations.

It is my considered opinion that there is no room for other rules such as the RHC to operate in the realm of bankruptcy. As stated earlier, the Act and the rules are comprehensive piece of legislation designed by Parliament to deal with matters pertaining to bankruptcy and must be complied with strictly. The RHC will only operate if there is a *lacunae* in the Act or the Rules. In the present case, there is no *lacunae*. In *Re Teok Kien Seng (t/a Kien Hoe Seng Engineering Construction Co.); ex parte Saw Siew Chew* [1991] 3 CLJ at p. 2599 the court held,

> Rules 120 and 122 of the Bankruptcy Rules 1969 (the Rules) which require the petitioning creditor to be present, must be taken to refer to a situation where he is acting in person or where there is serious challenge to the existence of the act of bankruptcy. Although r. 276 of the Rules excludes the RHC 1980 in bankruptcy matters, the Rules make it clear that parties may be represented by a solicitor.

In the result the appeal is allowed with costs and the order dated 19 March 1998 by the SAR is hereby set aside.